

STATE OF MICHIGAN  
COURT OF APPEALS

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HENRY BARBER and MARILYN BARBER,

Plaintiffs-Appellants,

v

JOSEPH KEATING,

Defendant-Appellant.

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UNPUBLISHED

April 21, 1998

No. 198085

Van Buren Circuit Court

LC No. 96-041653-CZ

Before: Markey, P.J., and M.J. Kelly and Whitbeck, JJ.

PER CURIAM.

Plaintiffs, neighbors of defendant, sued to enjoin defendant's construction of an addition to defendant's home which, plaintiffs contended, interfered with plaintiffs' lake view. Plaintiffs alleged that defendant secured the requisite zoning board approval for a variance, only because plaintiffs voiced no opposition to defendant's request based upon defendant's misrepresentation concerning the addition.

Following a bench trial, the trial court found no fraud or misrepresentation and no meeting of the minds between the parties as to the nature and the extent of defendant's addition. Accordingly, the trial court vacated an order temporarily restraining further construction and denied plaintiffs' request for permanent injunctive relief. The court also denied plaintiffs' request to enter judgment without prejudice so that plaintiffs could amend their pleadings to seek damages. Plaintiffs now appeal as of right. We affirm.

I

Plaintiffs argue that the trial court's findings are clearly erroneous. We disagree.

A trial court's findings of fact may not be set aside on appeal unless we find them to be clearly erroneous. MCR 2.613(C). "[A] finding is clearly erroneous when, on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made." *Boyd v Civil Service Comm*, 220 Mich App 226, 235; 559 NW2d 342 (1996).

The trial court found both an absence of fraud and the absence of any agreement between the parties. Plaintiffs' argument that the trial court's findings are clearly erroneous, i.e., that there was fraud and that there was an agreement, is based only on references to plaintiff Henry Barber's testimony. Plaintiffs ignore defendant's testimony. By engaging in only a limited discussion of the evidence, plaintiffs fail to satisfy their burden of demonstrating that the trial court's findings are clearly erroneous. A trial court's findings are clearly erroneous only when, "*on review of the whole record*," it is plainly apparent that a mistake has been made. *Id.*; emphasis added. After a review of the whole record, we cannot so conclude. Thus, we find no clear error on the record before us.

## II

Plaintiffs next argue that the trial court abused its discretion in refusing to allow plaintiffs to present the testimony of two zoning board members to the effect that, had they been advised of plaintiffs' opposition, they would have voted against defendant's variance request.<sup>1</sup> We disagree.

The decision whether to admit or to exclude evidence rests within the sound discretion of the trial court, and its decision will not be disturbed on appeal absent an abuse of that discretion. *Price v Long Realty, Inc.*, 199 Mich App 461, 466; 502 NW2d 337 (1993). An abuse of discretion is found only where an unprejudiced person, considering the facts upon which the trial court acted, would say that there was no justification or excuse for the ruling made. See, e.g., *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

Assuming the trial court erred in excluding the testimony, such error would be harmless. An error is harmless where it could not have affected the verdict or judgment. MCR 2.613(A); *People v Mateo*, 453 Mich 203, 206-207, 214-215; 551 NW2d 891 (1996). "Simply stated, and employed in both federal rule and case law and state statute and court rule, reversal is only required if the error was prejudicial. That inquiry focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence." *Id.* at 215 (citations omitted).

The instant record does not clearly indicate the number of voting members on the zoning board. Thus, we cannot determine whether the decision to grant the variance would have been different even if the two witnesses would have voted to deny defendant's requested variance.<sup>2</sup> Therefore, any error was harmless.

## III

Finally, plaintiffs argue that the trial court abused its discretion in denying plaintiffs' request to have judgment enter without prejudice so that they could amend their pleadings to plead a claim for damages. We disagree.

"A trial court should freely grant leave to amend if justice so requires." MCR 2.118(A)(2); *Jenks v Brown*, 219 Mich App 415, 420; 557 NW2d 114 (1996). "Leave to amend should be denied only for particularized reasons, such as undue delay, bad faith, or dilatory motive on the

movant's part, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or *where amendment would be futile*.” Id. (emphasis added).

We find that the trial court properly denied plaintiffs' request based upon futility. A damage claim would fail for the same reasons that plaintiffs' claim for injunctive relief failed: the trial court determined that defendant did not engage in tortious conduct, i.e., fraud or misrepresentation, and that the parties did not have a contract. Thus, we see no basis upon which a claim for damages could rest, and plaintiffs fail to articulate any.

Affirmed.

/s/ Jane E. Markey

/s/ Michael J. Kelly

/s/ William C. Whitbeck

<sup>1</sup> The trial court upheld defendant's objection to the testimony as calling for speculation.

<sup>2</sup> There was testimony that, on an unrelated matter, a variance request was approved by 4-to-3 vote, thus suggesting that the zoning board is comprised of seven members. Assuming a seven-member composition and assuming that the two board members that plaintiff offered as witnesses at trial would have voted against defendant's variance request in addition to the board member who in fact voted against the request, the best that can be said is that defendant's variance request would have yet passed by a 4-to-3 vote.